DENNIS G. CROSEN
(Appellee)

v.

ROCKINGHAM ELECTRIC, INC.
(Appellee)

and

BEDIVERE INSURANCE CO./MAINE INSURANCE GUARANTY ASSOCIATION
(Insurer)

and

BLOUIN MOTORS, INC.
(Appellant)

and

MAINE AUTOMOBILE DEALERS ASSOCIATION WORKERS' COMPENSATION TRUST
(Insurer)

Argument held: February 8, 2023
Decided: April 19, 2023

PANEL MEMBERS: Administrative Law Judges Sands, Chabot, and Hirtle
BY: Administrative Law Judge Hirtle

[¶1] Blouin Motors, Inc., appeals from a decision of a Workers' Compensation Board (*Elwin, ALJ*) administrative law judge granting Rockingham Electrical Supply's Petition to Determine Rights and Responsibilities and denying

Blouin's Petitions to Exclude Inflation Adjustments[1] and To Take Full Social Security Offset regarding Dennis Crosen's two injury dates: September 24, 1984 (Rockingham), and November 14, 2002 (Blouin). Blouin contends the ALJ erred when deciding that Blouin was limited to taking a portion of the offset for Mr. Crosen's social security old-age benefits authorized by 39-A M.R.S.A. § 221 (3)(A)(1), equal to the previously established 60% apportionment finding in the case. We disagree and affirm the decision.

## I. BACKGROUND

[¶2] Dennis Crosen injured his cervical spine while working for Rockingham on September 24, 1984, and his lumbar spine while working for Blouin on November 14, 2002. The board (*Elwin, ALJ*) issued a decision dated October 3, 2012, awarding ongoing total incapacity benefits and apportioning responsibility for these benefits 40% to Rockingham and 60% to Blouin. *See* 39-A M.R.S.A. § 354.[2]

[1] Blouin did not challenge the decision regarding inflation adjustments on appeal.

[2] Title 39-A M.R.S.A. § 354 provides, in relevant part:

> **1. Applicability.** When 2 or more occupational injuries occur, during either a single employment or successive employments, that combine to produce a single incapacitating condition and more than one insurer is responsible for that condition, liability is governed by this section.
>
> **2. Liability to employee.** If an employee has sustained more than one injury while employed by different employers, or if an employee has sustained more than one injury while employed by the same employer and that employer was insured by one insurer when the first injury occurred and insured by another insurer when the subsequent injury or injuries occurred, the insurer providing coverage at the time of the last injury shall initially be responsible to the employee for all benefits payable under this Act.

The 2012 decision ordered Blouin to make all initial payments to Mr. Crosen and Rockingham to reimburse its 40% share to Blouin. Rockingham was also required to pay inflation adjustments to Blouin pursuant to the law in effect at the time of the 1984 injury, 39 M.R.S.A. § 54, which Blouin would then pay to Mr. Crosen, consistent with the Law Court's holding in *Dunson v. South Portland Housing Authority*, 2003 ME 16, ¶ 3, 814 A.2d 972; *see also* 39-A M.R.S.A. § 201(6).[3]

[¶3] During the current litigation, the ALJ found that Mr. Crosen began receiving social security old-age benefits in 2014. The law governing Mr. Crosen's 1984 injury with Rockingham does not authorize an offset for social security old-age benefits. *See* 39 M.R.S.A. §§ 62, 62-A (repealed by P.L. 1991, ch. 885, § A-7).[4] The law governing Mr. Crosen's 2002 injury with Blouin does permit an offset for

> **3. Subrogation.** Any insurer determined to be liable for benefits under subsection 2 must be subrogated to the employee's rights under this Act for all benefits the insurer has paid and for which another insurer may be liable. Apportionment decisions made under this subsection may not affect an employee's rights and benefits under this Act.

[3] Title 39-A M.R.S.A. § 201(6) provides:

> If an employee suffers a work-related injury that aggravates, accelerates or combines with the effects of a work-related injury that occurred prior to January 1, 1993 for which compensation is still payable under the law in effect on the date of that prior injury, the employee's rights and benefits for the portion of the resulting disability that is attributable to the prior injury must be determined by the law in effect at the time of the prior injury.

[4] An offset for social security old-age benefits was first enacted by the Legislature in 1985. P.L. 1985, ch. 372 (effective June 30, 1985, codified at 39 M.R.S.A. § 62-B).

social security old-age benefits. 39-A M.R.S.A. § 221(3)(A)(1).[5] Blouin and Rockingham informally agreed that Blouin would reduce its weekly compensation paid to Mr. Crosen consistent with 60% of the full social security offset, in line with the board's 2012 apportionment finding. This informal arrangement continued until 2021.

[¶4] In 2021, Rockingham's workers' compensation insurance company, Bedivere Insurance Co., was declared insolvent, triggering the Maine Insurance Guaranty Association (MIGA)'s obligation to step in and pay the subset of Bedivere's "covered claims," defined by statute. 24-A M.R.S.A. §§ 4431 to 4452. Because the definition of "covered claims" excludes workers' compensation claims for apportionment reimbursement, Rockingham/MIGA ceased contributing payments to Blouin for Mr. Crosen's claim. *See Me. Ins. Guaranty Ass'n. v. Folsom*, 2001 ME 63, ¶ 8 & n.2, 769 A.2d 185 (interpreting the term "covered claim" under 24-A M.R.S.A. § 4435 to exclude workers' compensation apportionment against an

[5] Title 39-A M.R.S.A. § 221(3) provides:

> **Coordination of benefits.** Benefit payments subject to this section must be reduced in accordance with the following provisions.
>
> **A**. The employer's obligation to pay or cause to be paid weekly benefits other than benefits under section 212, subsection 2 or 3 is reduced by the following amounts:
>
> (1) Fifty percent of the amount of the old-age insurance benefits received or being received under the United States Social Security Act. For injuries occurring on or after October 1, 1995, such a reduction may not be made if the old-age insurance benefits had started prior to the date of injury of if the benefits are spouse's benefits[.]

insolvent insurer). Accordingly, Blouin continued to pay Mr. Crosen the full weekly benefit despite Rockingham/MIGA's nonpayment.

[¶5] The pending petitions followed with Blouin seeking a finding (1) that Blouin may cease paying Mr. Crosen the inflation adjustments owed on his 1984 injury because Rockingham was no longer supplying that payment, and (2) that Blouin may take the full, available social security offset rather than 60% of that offset.

[¶6] The ALJ rejected both claims. Specifically, the ALJ concluded that *Juliano v. Ameri-cana Transport*, 2007 ME 9, ¶ 17, 912 A.2d 1244, was controlling and required Blouin to pay the inflation adjustment to Mr. Crosen even without reimbursement from Rockingham. Further, the ALJ determined that Blouin may not increase its proportionate share of the social security offset because (1) 40% of Mr. Crosen's incapacity is attributable to the 1984 injury; (2) no social security offset is available for benefits due for the 1984 injury; and (3) apportionment findings "may not affect an employee's rights and benefits under this Act," 39-A M.R.S.A. § 354(3).

[¶7] Blouin filed a Motion for Additional Findings of Fact and Conclusions of Law, which the ALJ denied. This appeal followed.

## II. DISCUSSION

### A. Standard of Review

[¶8] The role of the Appellate Division "is limited to assuring that the [ALJ's] findings are supported by competent evidence, that [the] decision involved no misconception of applicable law and that the application of the law to the facts was neither arbitrary nor without rational foundation." *Moore v. Pratt & Whitney Aircraft*, 669 A.2d 156, 158 (Me. 1995) (quotation marks omitted). Because Blouin requested findings of fact and conclusions of law following the decision, the Appellate Division will "review only the factual findings actually made and the legal standards actually applied by the [ALJ]." *Daley v. Spinnaker Indus., Inc.*, 2002 ME 134, ¶ 17, 803 A.2d 446.

### B. Apportionment and Social Security Offset

[¶9] Blouin contends the ALJ erred because: (1) section 221 mandates the full offset for social security old-age benefits and contains no authority for a proportionate offset, which would allow for a double recovery; (2) after Belvidere became insolvent and MIGA was shielded from liability by Title 24-A, the case no longer met the qualifying language of section 354 as there was no longer "more than one insurer … responsible" for Mr. Crosen's condition; and (3) the Law Court permitted a full offset similar to the one sought here in *Berry v. H.R. Beal & Sons*, 649 A.2d 1101 (Me. 1994).

[¶10] Mr. Crosen argues: (1) Blouin's urged outcome is inconsistent with Law Court precedent, citing *Juliano*, 2007 ME 9, 912 A.2d 1244; (2) the ALJ correctly applied the plain language of section 354 to determine that the apportionment findings must not affect Mr. Crosen's benefits; and (3) the Law Court in *Berry* explicitly did not decide the issue of offsets.

[¶11] Mr. Crosen's arguments are persuasive. In *Juliano*, the Law Court held that section 354 applies even when the insurer of an earlier work injury becomes insolvent and has its liabilities assumed by MIGA, requiring the still-solvent insurer of a later injury to pay all benefits without reimbursement. 2007 ME 9, ¶ 15. Specifically, the Court held in *Juliano* that to reduce benefits owed to an injured employee because of an insurer's insolvency would contradict section 354(3), which prohibits apportionment from reducing an employee's benefits. *Id.* We see no error in the ALJ's s conclusion that the plain language of section 354(3) and the *Juliano* decision require Blouin to pay Mr. Crosen's full benefit even though MIGA no longer contributes the amount that Rockingham/Bedivere contributed.

[¶12] Further, we are not persuaded that the Law Court's decision in *Berry* directs a different outcome. The Law Court expressly stated in *Berry* that it will not decide the issue of whether a proportionate offset for social security old-age benefits was warranted. 649 A.2d at 1103. However, the Court also stated that it was correct to give the remaining insurer the full amount of the offset because the offset amount

was less than the proportionate amount of benefits owed by the remaining insurer. *Id.* The latter statement, which most strongly supports Blouin's argument in this case, appears to be *obiter dictum*.

[¶13] Additionally, the language of section 354 relied upon by the ALJ in this case first became effective on October 9, 1991. P.L. 1991, ch. 615, § A-48 (codified at 39 M.R.S.A. § 104-B(3)). The petition for apportionment in *Berry* was filed in September of 1990. *Berry*, 649 A.2d at 1101. We cannot discern from the *Berry* decision whether the relevant language of what would become section 354 was in effect at any time during litigation. When comparing the dictum in *Berry* to the clear holding of *Juliano*, we find the plain language of section 354(3) and its application in *Juliano* to be more persuasive, and we therefore conclude the ALJ committed no reversible error based on the Court's *Berry* decision.[6]

## III. CONCLUSION

[¶14] The ALJ neither misapplied nor misconstrued the law when determining that 39-A M.R.S.A. § 354 prohibits the relief sought by Blouin, because Blouin's urged outcome would use an apportionment finding to reduce Mr. Crosen's total incapacity benefits.

[6] Additionally, the Legislature acted to overturn *Berry* on other grounds in the legislative session immediately following the decision. P.L. 1995, ch. 76 § 1 (117th Legislature) (codified at 39-A M.R.S.A. § 221(3)(A)(1)). The Statement of Fact that accompanied the bill explicitly provides: "This bill is intended to overturn the Law Court's decisions in *Casey v. Town of Portage Lake*, 598 A.2d 448 (1991) and in *Berry v. H.R. Beal & Sons, et al.*, Decision no. 7040 [649 A.2d 1101], November 9, 1994." L.D. 304, Statement of Fact (117th Legis. 1995).

The entry is:

The administrative law judge's decision is affirmed.

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Any party in interest may request an appeal to the Maine Law Court by filing a copy of this decision with the clerk of the Law Court within twenty days of receipt of this decision and by filing a petition seeking appellate review within twenty days thereafter. 39-A M.R.S.A. § 322.

Pursuant to board Rule, chapter 12, § 19, all evidence and transcripts in this matter may be destroyed by the board 60 days after the expiration of the time for appeal set forth in 39-A M.R.S.A. § 322 unless (1) the board receives written notification that one or both parties wish to have their exhibits returned to them, or (2) a petition for appellate review is filed with the law court. Evidence and transcripts in cases that are appealed to the law court may be destroyed 60 days after the law court denies appellate review or issues an opinion.

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